

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SHAHRIAR S. ,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2010070090

DECISION

The hearing in the above-captioned matter was held on December 1, 2010, before Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings. Claimant Shahriar S. was represented by his mother, Mrs. V.¹ The Service Agency, Westside Regional Center (Westside or Service Agency) was represented by Lisa Basiri, Fair Hearing Coordinator.

Evidence was received, the case argued, and the record held open so that written argument could be submitted. Claimant's written argument was timely received, and is identified for the record as Exhibit F. The Service Agency's written argument was also timely received, and is marked for identification as Exhibit 12.

The matter was submitted for decision on December 28, 2010.

The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows:

ISSUE PRESENTED

May the Service Agency reduce in-home respite services provided to Claimant and his family from 13 hours per week to 30 hours per month?

¹ Initials are used in the place of Claimant's surname in the interests of privacy.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a seventeen-year-old boy² who is eligible to receive services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq,³ based on a diagnosis of Autism.

2. (A) On or about June 10, 2010, Westside issued a Notice of Proposed Action (NOPA) to Claimant, which stated that effective September 1, 2010, it would reduce in home respite services from 13 hours per week to 30 hours per month. (See Ex. 1.) The Service agency cited sections “4685.1-5” as authority for its proposed action. In a letter dated June 10, 2010, that accompanied the NOPA (hereafter NOPA letter), the Service Agency expanded on its rationale for reducing the respite services.

(B) According to the NOPA letter, also part of Exhibit 1, the Service Agency’s Purchase of Services Committee recommended that the family apply for and obtain more “protective supervision” from IHSS—In Home Support Services. The Service Agency noted that Claimant was then receiving 195 hours of IHSS services, along with the respite services from the Service Agency totaling 58.5 hours per month. The Service Agency stated that it was also providing 84 hours per month of specialized supervision after school care, and eight hours per day of such care during school breaks, including 271 hours during the summer. And, Westside noted that it was then providing 91 hours per month of in-home behavioral interventions.

(C) Pointing out that Claimant was in school for six hours per day, for a total of 135 hours per month, the Service Agency calculated that it, the school district, and IHSS were then supporting 563.5 hours per month.

3. On June 12, 2010, Claimant’s mother submitted a fair hearing request. In August 2010, the parties participated in an informal hearing. The Service Agency proposed a resolution somewhat different than set out in the NOPA, but the parties were unable to resolve the dispute, and this proceeding ensued. All jurisdictional requirements have been met.

² Claimant was born on April 24, 2003.

³ All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

The Nature of Claimant's Disability

4. (A) As previously noted, Claimant suffers from Autism, a malady which tends to isolate those afflicted from the world around them, as it interferes with communication and socialization in a variety of ways. According to Claimant's June 28, 2010 Individual Program Plan (IPP), he lives with his parents and is ambulatory, but is largely non-verbal, and his non-verbal communication skills are limited. He uses a picture exchange method to communicate his needs, and is described as having "some responsive skills, he can respond to his name and favorite activities that are offered to him." (Ex. 5, p. 1.) He can toilet, but needs moderate supervision and assistance, including wiping after a bowel movement, and he wears pampers at night because of accidents.

(B) The June 2010 IPP indicates that Claimant also needs assistance in bathing, dressing, and personal hygiene; his father assists him in showering. He can use a spoon with some spillage, cannot make his own snacks or meals, and is described as needing constant supervision. (*Id.*, p. 2.) He requires prompts to accomplish self-help activities, and he has episodes of resistance and non-compliance to the point that he at times is unmanageable. The IPP indicates that such maladaptive behaviors are a daily occurrence. Another maladaptive behavior is his tendency to wake at night and wander around the house. If this happens, it can take two to three hours for him to go back to sleep.

5. Claimant engages in physically aggressive behavior, towards himself or towards others. According the vendor of his behavior interventions, his aggressive and self-injurious acts are usually preceded by requests to do something he does not want to do, or denial of something he does want to do, although these maladaptive behaviors also provide sensory fulfillment and stress release. (Ex. 8, pp. 5- 6.)

6. Claimant's cognitive levels are not disclosed in the records from IPPs or other Service Agency documents received in evidence. There is a reference in the November 2010 report by IABA, the firm providing behavioral intervention services, that indicates that his cognitive levels may well be impaired. Hence, in a discussion of "focused support strategies," it is noted that "due to Shahriar's cognitive deficits it has been difficult for him to understand the correlation between appropriate behavior and a reward." (Ex. 8, p. 9.) A draft report from IABA, dated August 1, 2009, refers to his diagnosis as Autism and Mental Retardation. (Ex. 9, p. 1.) However, that dual "diagnosis" is not found in the IPPs, Exhibits 5 and 7.

7. IABA reports that Claimant's preferred activities are watching his television, and especially Barney videos. (See Ex. 8, pp. 9, 11 [re: non-preferred activities; 12 [shaping mealtime behavior difficult because Claimant prefers his television]; 14 [aggressive behavior usually occurs when Claimant asked to transition from "TV/video stimming"] In the past he has been observed to rewind and fast-forward the videos, while self-stimming, or to put his ear against his television, while

humming. (Ex. 9, p. 6.) A fair reading of the more recent report is that such behaviors have not been completely suppressed.

8. There is some indication that Claimant does better in the school environment. A draft of his Individual Education Plan, for October 2010, indicates that his behavior had improved, although he still exhibited self-abusive behaviors such as hitting himself. The draft IEP indicates that tantrum behaviors were occurring about one time per month, and that stereotypical behaviors such as hand flapping were occurring at random times during the day. (Ex. 11, p. 9.) And, according to the school, he was showing some independence on the campus; he could request to use the restroom by showing a picture icon to staff, and was described as “fully independent in the use of the bathroom, but need verbal prompts . . . to wash his hands after use.” (*Id.*, p. 8.) He was also said to be able to warm up a meal in the microwave oven.

Services Provided To Claimant

9. A number of services are provided to Claimant by the Service Agency, and by others. All are relevant to assessing the need for respite.

10. (A) The Service Agency, aside from providing respite care, has been providing 91 hours of behavioral interventions, and another 20 hours of service by IABA is authorized for supervision, staffing, and parent training. At his parents’ request, Claimant was receiving the behavioral interventions on Mondays, Wednesdays and Fridays from 4:00 to 8:00 p.m., on Sundays from 11:00 a.m. until 7:00 p.m., and on alternating Saturdays from 11:00 a.m. to 7:00 p.m. (Ex. 8, p. 2.)

(B) Further, Westside is providing 84 hours per month of Specialized Supervision after-school care, and eight hours per day of Specialized Supervision during school breaks, which encompassed 271 hours during the 2010 summer break.

(C) The Service Agency has been funding one case of diapers per month.

11. IHSS has been funding 195 hours per month of support in the home. The Service Agency has pointed out that IHSS can provide up to 283 hours of support in a month, and that Claimant is quite likely eligible for an increase of total hours to that maximum amount, through provision of “protective supervision” hours.

12. Claimant receives special education services. They are funded through the Los Angeles Unified School District (District); Claimant attends a private school in the San Fernando Valley. He is in school approximately six hours per day. He will remain in special education until he is 22 years old. (Ex. 5, p. 6.)

13. The total hours of support funded by Westside or a generic resource is 563.5 hours per month. While this may not completely remove a parent from supervision of Claimant during all of those hours, the burden on the parents is reduced. Claimant is out of the home when at school, and when the behavioral intervention staff is working with him, a parent may not need to be present for every part of the session, which can be eight hours long. When specialized supervision is present, for about 20 hours per week, the burden is eased as well.

Other Factors Pertaining to Respite Needs

14. Both of Claimant's parents are employed in full-time jobs, as engineers for the State of California. Claimant's parents must commute from their home in the west San Fernando valley to downtown Los Angeles. Claimant's mother works a "9-80" schedule, working nine 10-hour days every two weeks. The long commute, coupled with a long work day, can leave Claimant's parents drained by the time they return home.

15. Claimant, nearly an adult, has become more difficult to manage when he acts out because he has grown to over six feet in height. While he is not especially heavy, his increased size hampers his mother, who is not a large woman, if she must respond to him acting out.

16. As set out in Factual Finding 4(B), it is reported that Claimant does not always sleep through the night. If he gets up, his mother gets up too, in order to keep an eye on him. Such sleep interruptions add additional stress for a person with a full-time job and a long commute.

17. An additional concern enunciated by Claimant's mother is the fact that a neighbor appears to have a bias against her son and his condition. He has reportedly bothered persons who come to work with Claimant, and has created conflict with the family. In 2008 there was an incident where Claimant eloped from the family home, and authorities were called, leading to Claimant being taken by ambulance to a local hospital. However, there is only one such incident of this type reported.

18. Claimant's parents fund other services for him, such as a recreational therapist and a speech therapist. The record does not make clear how many hours per week of such services are provided to Claimant.

19. The record does not establish that Claimant and his family need more than 30 hours of respite per month in order for him to stay in the family home. To the contrary, it appears that his parents have made great efforts to keep him at home, despite the nature and extent of his disabilities.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 3.
2. Services are to be provided in conformity with the IPP, per section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing may establish such terms. (See § 4710.5, subd. (a).)
3. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d); 4501; 4502; 4502.1; 4512, subd. (b); 4640.7, subd. (a); 4646, subds. (a) & (b), 4648, subds. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subds. (a)(1) & (a)(2).)
4. Services provided must be cost effective (§ 4512, subd. (b), *supra*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many children and families.
5. (A) Section 4512, subdivision (b), of the Lanterman Act provides, in pertinent part, that:

“Services and supports for person with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . . The determination of which services and supports are necessary shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program

plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . physical, occupational, and speech therapy, . . . habilitation, . . . recreation, . . . camping, community integration services, . . . respite, . . . social skills training

Thus, respite care is clearly available under section 4512, subdivision (b).

6. “In-home respite services” are defined in the Lanterman Act as “intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client’s own home, for a regional center client who resides with a family member.” (§4690.2, subd. (a).) Subdivision (a) of section 4690.2 goes on to state that respite services are designed to “do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision in maintaining the client at home.
- (3) Relieve family members from the constantly demanding responsibility of caring for the clients.
- (4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members.”

7. Effective July 1, 2009, limits were imposed on a regional center’s ability to purchase respite care for the families of consumers. Specifically, section 4686.5 was added to the Lanterman Act. It provides, essentially, that a regional center shall not purchase more than 90 hours of in-home respite in a quarter of one year. (§4686.5, subd. (a)(2).) However, a regional center may grant an exemption, and provide more of such services, where it is demonstrated either that more than 90 hours per quarter of respite care is required in order to maintain the Claimant in the family home, or where it has been established that there has been an extraordinary event that impacts the family’s ability to meet the care and supervision needs of Claimant. The new statute also makes clear that in order to obtain respite care, it must be shown that the family’s needs for such exceed those of a family of a child without disabilities. (*Id.*, at subd. (a)(1).)

8. Claimant and his family clearly require respite care, based on Factual Findings 1, 4, 5, and 6. The question in this case is simply how much should be provided: the new statutory maximum, or an exemption-based amount. In this case the Service Agency has proven that under the law it must reduce the level of respite services absent proof that an exemption applies. The burden of proof on the issue of an exemption falls on Claimant. (Evid. Code, § 500.)

9. Claimant is unable to meet that burden of proof. While he has significant disabilities and significant needs, it has not been established that there has been some extraordinary event that has impacted the family's ability to care for and supervise him. At the same time, it has not been established that the parents will not be able to keep him in the family home if only 30 hours of respite is granted. On this latter point, it must be noted that Claimant and his family receive substantial support from various agencies, including Westside, which has the potential of reducing the need for in-home respite care, and more help, such as IHSS funding, may be available.⁴

10. The parties devoted considerable attention to the issues such as whether more IHSS funding could be obtained, the effect of the Medicare waiver, and what additional IHSS funding could be used for. Ultimately, those matters are of less relevance than they would have been prior to the enactment of section 4686.5. The new limit on respite tends to short-circuit the classic analysis of respite need. That is, even a case of very significant need may top out at the 30-hour maximum; this is such a case. Under the new law, if there is no threat that the consumer will have to leave the family home, or if there has been no extraordinary event preventing the family from continuing to provide supervision and care, then the cap may not be exceeded.

11. Based on all the foregoing, the appeal must be denied, and the Service Agency's proposed action sustained.

ORDER

The appeal of Claimant Shahriar S. is hereby denied, and the proposed action by the Service Agency sustained.

May 17, 2011

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.

⁴ In this case, where funding exists to support Claimant for over 550 hours per month, when an average month has 720 hours, it must be said that supports are provided for approximately 75 percent of the time. In prior years this would have mitigated against a large grant of respite funding.